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No. 71-1257

In the Supreme Court of the United States

OCTOBER TERM, 1971

CLARKE RAYMOND MOORE AND JOHN BERNARD SPELZ,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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After a jury trial in the United States District Court for the Eastern District of Kentucky, petitioners were convicted on two counts of having conspired to manufacture and knowingly process for sale diethyltryptamine (a depressant or stimulant drug), and of having knowingly manufactured that drug, in violation of 21 U.S.C. (1964 ed., Supp. V) 331(q)(1). Petitioner Spelz was also convicted on two counts charging the knowing possession of other stimulant or depressant drugs. Each petitioner was sentenced to consecutive one-year terms of imprisonment on the conspiracy and manufacturing counts. The court of

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appeals affirmed the convictions on these counts but reversed, for lack of sufficient evidence, Spelz' conviction on the counts charging possession (Pet. App. A).

Petitioners' attack on the sufficiency of the affidavit to support a search warrant (set forth at Pet. App. xi–xv) is fully answered in the opinion of the court below, on which we rely (Pet. App. v–vi). With respect to the government's Exhibit 11, which was not included in the inventory accompanying the agents' return of the search warrant, the decision of the court of appeals upholding admission of this evidence does not give rise to a conflict among the circuits as petitioners claim (Pet. 9–12). The case cited by petitioners as being in conflict with the decision below—*Murby* v. *United States*, 293 Fed. 849 (C.A. 1)—held only that the evidence should be suppressed when there had been no return whatsoever. Here, where no bad faith was shown and where only a single item was omitted, the court of appeals properly ruled that since petitioners did not claim surprise at trial, the agents' failure to include the item in the return did not require its suppression. The court below pointed out that at trial the defense explored the possibility that the document comprising Exhibit 11 was in an automobile outside the laboratory (Pet. App. vii); the court further noted that in their motion for a new trial, which the district court denied, petitioners alleged that the exhibit was in Reinking's car at the time of the search of the premises, but they did not offer anything in support of the allegation and did not request a hearing (Pet. App. x).

It is therefore respectfully submitted that the petition for a writ of certiorari be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MAY 1972.

U.S. GOVERNMENT PRINTING OFFICE 1972